No. 87-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW ENERGY COMPANY OF INDIANA,

Appellant,

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO, and SOUTH POINT ETHANOL,

Appellees.

On Appeal From The Supreme Court Of Ohio

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

NEIL F. HARTIGAN
Attorney General, State of Illinois
SHAWN W. DENNEY
Solicitor General, State of Illinois
State of Illinois Center
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3312
Counsel for Amicus Curiae
The State of Illinois

ROSALYN B. KAPLAN *
MICHAEL WYNNE
Assistant Attorneys General
State of Illinois Center
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 917-6141
Of Counsel

* Counsel of Record

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INTEREST OF THE STATE OF ILLINOIS

> [T]he ethanol market has continued to grow, *stimulated especially by farmers' economic problems.* (emphasis supplied)
> Brief of Appellant, New Energy Co., at p. 7.

The raw materials from which the overwhelming majority of domestic ethanol is distilled are corn and cereal grain. Illinois is a major producer of these agricultural

raw materials, and is also a major producer of ethanol. The current "farm crisis," a result of the increase in the price of materials, equipment, debt service and fuels, as well as the concurrent decrease in the price that agricultural products can muster due to large surpluses, has adversely affected the farmers of Illinois and the nation. There are two ways to solve the crisis. The first method, governmental disincentives to production, is costly and, though necessary, inherently abhorrent. The second method is to increase demand. Illinois prefers the latter method and has adopted legislation similar to that reviewed in this appeal.[1] Increased demand for ethanol results in increased demand for farm products, since a bushel of corn yields approximately 2.5 gallons of ethanol. The demand for ethanol will not increase unless states like Illinois and Ohio subsidize ethanol producers and fuel blend retailers.

The Ohio legislation, by encouraging the increased use of ethanol fuel blends, benefits all farmers, including those from Indiana and Illinois. Illinois therefore has a great interest in advancing the cause of measures which expand the market for farm products, generate farm income and reduce the amount of price-support payments made necessary by the farm crisis. Although the Ohio legislation was in part adopted to assure a healthful environment for the

[1] *See*, Ill.Rev.Stat. ch. 120, ¶ 442 (1985). In 1985 an independent fuel blend retailer challenged the Illinois statute on Commerce Clause grounds. The trial court upheld that challenge and a direct appeal of that ruling is presently before the Illinois Supreme Court pursuant to its Rule 302(a). *Russell Stewart Oil Co. v. Department of Revenue*, Ill. S.Ct. No. 63630. The case was argued in November and the parties have since advised the Illinois Supreme Court of the instant appeal. Contrary to the appellant's claim in its jurisdictional statement, p. 13, there is no official opinion of the Illinois Attorney General regarding the Illinois statute; the letter to which appellants refer clearly states that it is not an official opinion, and that letter pre-dates the enactment of the Illinois law.

citizens of Ohio, and it undoubtedly furthers that interest, the State of Illinois submits that additional vital state interests are furthered by Ohio R.C. 5735.145(B) and similar legislation, such as that of Illinois.

SUMMARY OF THE ARGUMENT

In a natural economic environment, where the fate of commerce in a particular commodity is determined by the forces of supply and demand, the fuel ethanol industry would not exist. The industry is the result of massive state and federal investment in the form of loans, loan guarantees, excise tax exemptions, sale and use tax exemptions, credits and other forms of allowances and incentives. Since the federal excise tax exemption for fuel blends is insufficient to render such blends competitive with gasoline, Congress envisioned that state subsidies would be necessary to render the blends competitive. Ohio and Illinois are among the states that subsidize their own ethanol industry and, although they are under no obligation to do so under the Commerce Clause, they also subsidize the industry of other states. In essence, the claim of New Energy Company of Indiana is that Ohio has an obligation to spend money on New Energy Company. The Constitution imposes no such obligation on any state. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

The industry that provides the raw materials for ethanol production, the corn and cereal grain industry, is also supported by massive state and federal involvement. In addition to the beneficial environmental consequences from the increased use of ethanol fuel blends, another motivation for the creation and maintenance of the ethanol in-

dustry is that increased demand for ethanol will reduce the surplus of grain, increase the market price of grain and reduce the amount of governmental price supports that the grain industry receives. All states, including Indiana, benefit from the increased demand for fuel blends which R.C. 5735.145(B) generates. Even if the reduced participation of New Energy Company in the Ohio gasoline market is viewed as a burden, that burden is far outweighed by the benefits to the corn and grain industry of all states.

If the analysis of *Pike v. Bruce Church*, 397 U.S. 137 (1970), is applicable to legislation which subsidizes a government created commerce, then a major flaw in the analysis must be corrected. The scope of the Court's inquiry into the affected commerce must not be limited to that commerce in which the plaintiff or its industry participates. The inquiry must expand into other markets and industries which may be affected by the legislation and which may enjoy a substantial benefit even if the plaintiff does not enjoy a similar benefit. That expansion is particularly appropriate where the plaintiff's industry is merely a conduit for other governmental objectives in other markets and industries. An inquiry which does not take into account the benefits of the legislation if they occur in an industry other than that of the plaintiff is an unwarranted infringement of the sovereign power of the states to act where Congress has not acted. The Ohio legislation does not burden commerce. It increases the flow of commerce in the ethanol industry and, more importantly, in the industry which the ethanol industry was created to advance, the corn and cereal grain industry. The decision of the Ohio Supreme Court upholding R.C. 5735.145(B) should be affirmed.

ARGUMENT

I.

THERE IS NO NATURAL FUNCTIONING INTERSTATE MARKET IN FUEL ETHANOL.

If natural economic forces of supply and demand had free play, the fuel ethanol industry and market would not exist. Consumers do not want ethanol fuel blends; the federal and state governments want them. Governments advocate the production and use of ethanol fuel blends as a means to remedy or alleviate local and national environmental and economic ailments. Amelioration of such ailments is not set in motion until the price of the ethanol fuel blend is sufficiently reduced, by governmental rather than economic forces, so that the blend is competitive with gasoline.

The cost to the state and federal governments to start up the process and maintain it in operation is substantial. For 1985, the total cost to those states that confer subsidies for ethanol production was \$302.5 million.[2] The cost to the federal government of the gasoline excise tax exemption for ethanol fuel blends was \$1,518,000,000 in 1987 and is projected at \$3,291,000,000 by 1991.[3] Even with that massive federal expenditure, unless the states also invest subsidy funds, the blends will still be priced substantially higher than gasoline and the consumer will reject them, thus thwarting both the state and federal objectives. So, clearly, the federal government depends upon some sort of state expenditure, such as Ohio has

[2] *See* Fuel Ethanol and Agriculture, An Economic Assessment, p. 10 (USDA Agricultural Economic Report No. 562, August, 1986), hereinafter referred to as the "Agricultural Economic Report."

[3] *Id.* at p. 11.

made and Indiana has not, to increase the amount of ethanol produced and broaden its share of the gasoline market.[4]

The ethanol industry and market were created and are maintained by government expenditures as a means to achieve other governmental objectives such as improving the quality of the air we breathe, reducing the amount of deficiency payments and other price support programs, and reducing the amount of imported oil. The extent to which the ethanol industry owes its existence to the programs of the state and federal governments and the cost of creating and maintaining that industry are easily apparent from a review of the federal legislation dealing with ethanol as a means to reduce dependence on foreign oil and to reduce the grain surplus.[5] Time and space lim-

[4] *See* The Agricultural Economic Report, at page 37, which concluded that "The fuel ethanol industry is not likely to survive the next decade without large Federal and State subsidies. The price of gasoline is not expected to again reach the high level achieved in 1980 until well after 1995. Therefore, a subsidy in excess of the $0.60 per gallon of ethanol provided by the Federal excise tax exemption will be necessary for most existing ethanol plants to continue operating. Without additional subsidies, growth in the ethanol industry is unlikely." *See also*, New Energy Co. brief at p. 6.

[5] The Solar Energy, Research, Development, and Demonstration Act of 1974 (P.L. 93-473) authorized research into and development of means for "the conversion of cellulose and other organic materials . . . to useful energy or fuels"; The Food and Argiculture Act of 1977 authorized loan guarantees of up to $15 million each for four biomass (ethanol from vegetative material) pilot plants, administered by the FHA and the Commodity Credit Corporation; The Energy Tax Act of 1978 (P.L. 95-618) exempted certain fuel blends from the $.04 per gallon Federal Excise Tax on gasoline through 1984 and provided a 10% energy investment tax credit (EITC) for equipment used to convert biomass to alcohol; The Interior and Related Agencies Act of 1979 (P.L. 96-126) appropriated $19 billion for an "Energy Security Reserve" to stimulate com-

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[5] *continued*

mercial production of alternative fuels, and earmarked $100 million each for product development studies and for cooperative agreements to support commercial scale developments; The Crude Oil Windfall Profit Tax Act of 1980 (P.L. 96-223) extended the $0.04 per gallon Federal excise tax exemption to 1992, extended the eligibility for EITC's to 1985, and provided an income tax credit to blenders of $.40 per gallon of ethanol; The Energy Security Act of 1980 (P.L. 96-294) provided insurance for loans of $1 million or less to small scale biomass producers, provided loan guarantees to cover 90% of the construction cost of biomass energy projects; provided price guarantees for products of biomass energy projects, and authorized the United States Department of Agriculture and the Department of Energy to spend $600 million on biomass energy projects; The Consolidated Farm and Rural Development Act of 1980 (P.L. 96-438) authorized the Farmers Home Administration to guarantee loans for alcohol production; The Agricultural Act of 1980 (P.L. 96-494) established an Alcohol Processor Grain Reserve Program which, upon a determination by the Secretary of Agriculture that alcohol producers cannot obtain grain at reasonable prices, will lend grain to federally financed producers (due to the grain surplus this provision has not been activated); The Omnibus Reconciliation Act of 1980 (P.L. 96-499) imposed an additional duty on imports of ethyl alcohol to be used as fuel of 10 cents per gallon in 1981, 20 cents in 1982 and 40 cents from 1983 through 1992; The Agriculture and Food Act of 1981 (P.L. 97-98) authorized the sale of government-owned corn below the statutory sale prices whenever supplies are not readily available (due to the grain surplus this provision has not been activated); The Emergency Preparedness Act of 1982 (P.L. 97-229) authorized the establishment of a Strategic Alcohol Fuel Reserve to stockpile alcohol fuel made from government-owned corn; The Surplus Agricultural Commodities Disposal Act of 1982 (P.L. 97-358) amended the Agricultural Act of 1949 to authorize the Secretary of Agriculture to use surplus stocks of grain for conversion to fuel alcohol; The Surface Transportation Assistance Act of 1982 (P.L. 97-424) raised the federal excise tax on gasoline to $.09 per gallon but increased the exemption for blend fuels from $.05 to $.09 per gallon, and also increased the income tax credit to the fuel blender from $.40 to $.50 per gallon; The Tax Reform Act of 1984 (P.L. 98-369) increased the fuel blender's income tax credit to $.60 per gallon and provides a $.06 per gallon of blended fuel exemption from the federal excise tax on gasoline; The Food Security Act of 1985 (P.L. 99-198) authorized the Secretary of Agriculture to make government-owned commodities available for free or at a reduced cost for production of liquid fuels; The Surface Transportation Act of 1987 (P.L. 100-

(Footnote continued on following page)

itations prohibit a similar review of state programs and an assessment of their great expense.

In industries and markets reated or maintained solely by virtue of state subsidies, the analysis used in prior "reciprocity" cases does not work. In those cases the statutes were "designed to neutralize the advantages belonging to the place of origin." *Baldwin v. Seelig*, 294 U.S. 511, 527 (1934). The only advantage one ethanol blend enjoys over another is the credit, exemption or grant that a state may confer. Since Indiana has chosen not to subsidize ethanol, ethanol from New Energy Co. of Indiana brings to Ohio no advantage that can be neutralized. The common thread of *Baldwin v. Seelig*, 294 U.S. 511 (1934), *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), and *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), is that "the state interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis supplied). There is no natural functioning interstate market in fuel ethanol, and therefore those cases are inapposite.

5 *continued*

117) extended the excise tax exemption for blended fuel to 1993; The Farm Disaster Assistance Act of 1987 (P.L. 100-45) required the Secretary of Agriculture to select a seven-member panel to conduct a study of the cost-effectiveness of ethanol production. (The report of that Panel is referred to herein as the National Advisory Panel Report).

II.

SUBSIDIES ALSO SUSTAIN THE CORN INDUSTRY THAT PROVIDES THE RAW MATERIAL FOR ETHANOL PRODUCTION, AND GREATER FUEL BLEND PENETRATION IN THE GASOLINE MARKET MAY WEAN THE FARM SECTOR FROM SUBSIDIES.

Corn is currently, and will probably remain, the predominant ethanol feedstock, with important contributions from several other grains and feedstocks.[6] Corn is the feedstock for 85 percent of domestic ethanol production, and other cereal grains supply an additional 3 percent of domestic production.[7] In 1979, total domestic ethanol production was only 20 million gallons, but it grew to 555 million gallons by 1985.[8] From 1979 to 1985 the utilization of grain for domestic ethanol production grew from 8 million bushels to 195 million bushels.[9] The current level of domestic production is at 850 million gallons per year and is moderately estimated to reach 1.1 billion gallons per year in 1992.[10]

Ethanol production will provide benefits to the agricultural sector in terms of higher prices for corn and other feed grains, increased farm income, and savings in agricultural program costs for ethanol.[11] On the average, net

6 *See* Fuel Ethanol Cost-Effectiveness Study, xvi (National Advisory Panel on Cost-Effectiveness of Fuel Ethanol Production—Final Report to Congress and the Secretary of Agriculture, Nov. 1987), hereinafter referred to as the "National Advisory Panel Report".

7 Appendix, Exhibit A, Feedstock Utilization as a Percentage of Current Ethanol Production.

8 Appendix, Exhibit B, U.S. Ethanol Production Utilization of Grain, 1979-1985.

9 Appendix, Exhibit C, U.S. Ethanol Production 1979-1985.

10 National Advisory Panel Report at p. xviii.

11 *Id.* at p. xiii.

farm income increases by $0.58 for each additional gallon of ethanol produced, or a projected $2.2 billion between 1986-1994.[12] More importantly, governmental savings in reduced deficiency payments to corn growers will amount to $3.3 billion between 1986-1994, because increased use of corn for ethanol production will lead to higher corn prices and smaller inventories of reserves.[13]

It is undoubted that the subsidy granted by R.C. 5735.145(B) encourages other states to increase the export of ethanol to Ohio and thereby makes ethanol available to Ohio consumers at prices that compete with gasoline. Likewise, the subsidies of other states encourage the export of ethanol from Ohio to those states and make ethanol available to consumers in those states at prices that can compete with gasoline. While Ohio may not be subsidizing Indiana's fuel ethanol industry in the same manner that it subsidizes that of other states, it is subsidizing Indiana's corn growers and those of *every* state regardless of the state's policy towards fuel ethanol. Indiana corn growers benefit on a par with corn growers in every state from the increased demand for ethanol blends and its consequent effect on the supply and price of corn. Each 100 million bushel increase in the demand for corn for ethanol production increases corn prices by $0.02 to $0.04 per bushel.[14] Any increase in the price of corn will lead to a decrease in the amount of deficiency payments from the government to farmers.[15]

[12] Agricultural Economic Report at p. 38.

[13] Agricultural Economic Report at p. 32.

[14] Agricultural Economic Report at p. 31.

[15] The Agricultural Economic Report concluded that ethanol production is a very costly proposition for the United States and that its major benefit, higher net farm income, was gained at the cost

(Footnote continued on following page)

III.

THE PRINCIPLE OF *HUGHES V. ALEXANDRIA SCRAP CORP.*, 426 U.S. 794 (1976), GAINS ADDED RELEVANCE WHERE THE STATE MUST LOWER THE PRICE OF THE FINISHED GOOD TO MAKE IT COMPETITIVE, IN ORDER TO BID UP THE PRICE OF THE RAW MATERIAL AND THUS REDUCE STATE AND FEDERAL PRICE SUPPORTS.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court rejected a Commerce Clause challenge to a Maryland provision offering a bounty on inoperable automobile hulks. The law placed in-state scrap processors at an advantage over all out-of-state scrap processors. The Court noted that "[w]e would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of a commerce dependent for its existence upon state subsidy instead of private market forces." *Id.* at 809, n. 18. Here, the only alleged reduction of commerce is in the flow of ethanol from New Energy Co. However, an increase in the flow of fuel ethanol is

[15] *continued*

of higher consumer expenditures. *Id.* at p. 38. The National Advisory Panel Report concluded that "[i]n considering future ethanol policy, Congress and the Federal Government should weigh *all* the costs and benefits of ethanol production." p. xix (emphasis supplied). *See,* The Tradeoff Between Federal Ethanol Subsidies and Agricultural Program Costs: An Economic Study, Prof. John Umbek, Purdue University. A report prepared for the National Corn Growers Association after the USDA Agricultural Economic Report, and using some of the same assumptions as that report, concluded that the USDA report set forth only minimum savings based on some unrealistic assumptions, such as that the government would recover 100% of its farm loan costs (p. 20), that government's corn storage costs were $2.65 per bushel when in reality they are $3.15 per bushel (p. 19), and that there would be no spoilage or deterioration of stored grain over time, and it ignored the effect of increased demand for corn on the government's deficiency payments.

achieved by the participation of other out-of-state producers who can compete with gasoline in Ohio, and Ohio producers who can also penetrate markets in other subsidizing states. Moreover, the flow of surplus grain is increased from *all* states, including Indiana.

It is clear that New Energy Co. could not argue that the failure of the Indiana legislature to spend any funds is a violation of the Commerce Clause, even though Indiana's failure to subsidize its own ethanol industry may disable New Energy from competing with gasoline sold in its own home state, as well as competing with gasoline in sister states. New Energy also could not argue that Ohio would violate the Commerce Clause if it decided to remove the subsidy entirely for both Ohio and out-of-state producers, for then ethanol, regardless of its source-state, would be unable to compete with gasoline entirely. The concurring opinion in *Hughes v. Alexandria Scrap Corp.*, *supra*, noted that "[u]nquestionably Maryland could terminate its entire program, discontinuing subsidy payments to Maryland operators as well as out-of-state firms, without offending the Constitution." 426 U.S. at 816. Thus, New Energy cannot argue that Ohio violates the Commerce Clause because it does not subsidize all out-of-state producers as well as its own producers; "[a] failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose upon the States any obligation to subsidize out-of-state businesses." *Id.*

As in *Alexandria Scrap*, the novelty here is that New Energy should characterize a subsidy to out-of-state business, which a state is under no obligation to provide, "as a burden which the Commerce Clause was intended to make suspect." *Id.* at 807. Just as "[n]othing in the purpose animating the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others" (*id.* at 810), here the concern over protective favoritism is not warranted because the Ohio statute subsidizes producers from other states as well as those of Ohio, *even if the out-of-state product has a lower pre-subsidy price than the Ohio product.* A major out-of-state producer may, by economies of scale, be able to produce ethanol at a sufficiently lower price than an Ohio producer and, with the Ohio subsidy, be able to compete more effectively against gasoline in Ohio.[16]

More importantly, Ohio may not be subsidizing Indiana's ethanol industry but it is increasing the demand for grain, including grain from Indiana. Ohio is raising the national market price of grain, which may result in better prices for Indiana corn products and in reduced deficiency payments to Indiana's farmers, as well as to those in every corn-growing state. Given the extent of state participation in both the ethanol industry and in the agricultural sector, the reason for application of the principles first established in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), is more compelling here than in that case.

IV.

IF THE COURT DECIDES THAT *PIKE V. BRUCE CHURCH*, 397 U.S. 137 (1970), IS APPLICABLE TO A STATUTE THAT SUBSIDIZES A GOVERNMENT CREATED COMMERCE, THEN THE TEST MUST BROADEN THE SCOPE OF INQUIRY INTO THE EFFECT ON COMMERCE.

Under *Pike v. Bruce Church*, 397 U.S. 137 (1970), a statute evidencing a non-protectionist purpose and effect, and promoting a legitimate state interest, will be upheld unless

[16] *See* Appendix, Exhibit D, Ethanol Anhydrous Capacity of Major Plants. For example, the ADM facility in Decatur, Illinois, can produce almost as much ethanol as New Energy Co. *and* South Point Ethanol.

it imposes a clearly excessive burden on commerce relative to the nature of the interest advanced. *Id.* at 192. The first part of the *Pike* test, requiring that the statute be facially neutral, eliminates those statutes which expressly or inherently protect the in-state industry from out-of-state competitors. A statute which subsidizes industry, particularly out-of-state industry, should not be subject to that analysis. Justice Powell, author of *Alexandria Scrap Corp., supra*, noted in the dissent in *Reeves v. Stake*, 447 U.S. 429 (1980), that:

> By "protectionism," I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market. *I would exclude from this term* policies relating to traditional governmental functions, such as education, *and subsidy programs* like the one at issue in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 49 L.Ed.2d 220, 96 S.Ct. 2488 (1976). (emphasis supplied)

Id. at p. 447, n. 1.

While most ethanol market participants are private companies (heavily backed by government loans and guarantees), their participation is possible only through government expenditure either by tax credits, refunds or exemptions. A distinction between a private and a governmental function "is whether the activity is supported with general tax funds, as was the case for the reprocessing program in Alexandria Scrap or whether it is financed by the revenue it generates." *Id.* at p. 453, n.3. Thus, statutes such as Ohio R.C. 5735.145(B), and Ill.Rev.Stat. ch. 120, ¶442 (1985), are not the type of statute to which the *Pike* test, or at least its first requirement, applies. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves v. Stake*, 447 U.S. 429, 447, 452 (1980).[17]

[17] Here, R.C. 5735.145(B) expressly confers on an out-of-state competitor the same subsidy that is conferred on the sole Ohio pro-

(Footnote continued on following page)

Should the Court decide, however, that the remainder of the *Pike* test is applicable, that is, that the subsidy is really "a burden which the Commerce Clause was intended to make suspect," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 807, and that the burden must be weighed "in relation to the putative local benefit," to determine if it is a clearly excessive burden, *Pike v. Bruce Church*, 397 U.S. at 142, then the Court should not limit the inquiry to the effect on the commerce in ethanol only. An inquiry as to the effect of a statute upon commerce must commence by defining the relevant commerce. The definition, and therefore the scope of analysis, should not be controlled by the industry to which the plaintiff belongs, nor by the industry which the statute expressly addresses. Rather, the definition should take into account the many state purposes which the statute may advance, although it does not express them, and the many industries which touch upon the plaintiff's business or industry, although they are not the subject of the statute. Such a broadened inquiry is particularly appropriate where, as here, the plaintiff's industry was created by government as a conduit for promoting broad societal interests related to decreasing dependence on foreign oil, reducing corn surpluses and reducing harmful pollutants, rather than merely to promote the ethanol industry for its own sake.

It is proper to examine industries other than the one immediately subject to the legislation. In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the statute at issue there banned the retail sale of milk in non-

[17] *continued*

ducer. On its face, therefore, it does not demonstrate a protectionist purpose nor indicate that it will have a protectionist effect in its application. In application, it is plain that ethanol from any state that subsidizes ethanol will receive a subsidy in Ohio *even if the pre-subsidy price is lower than that of ethanol produced in Ohio.* In its effect, therefore, R.C. 5735.145(B) is not protectionist.

returnable, non-refillable containers made of plastic. The Court noted that:

> Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or that the losers will be out-of-state firms. . . . Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms.

Id. at 472-73.

Here, there is every reason to believe that the larger non-Ohio ethanol producers will increase their participation in Ohio.[18]

More importantly, in *Minnesota v. Clover Leaf Creamery,* although the case involved the milk container industry, the Court looked to the industry supplying raw materials for the container industry and concluded that the local pulpwood industry would benefit at the expense of out-of-state raw materials suppliers, although permissibly so. Here, it is proper to look to the raw material source for the ethanol industry—corn and cereal grains—and, unlike *Minnesota v. Clover Leaf Creamery,* the benefit to that industry is not limited to any state nor is a corn grower in one state favored over one in another state. As New Energy Co. notes, South Point Ethanol of Ohio purchases corn from Ohio *and* Indiana. Corn growers in Indiana directly benefit from the increased demand for their product from South Point Ethanol and the non-Ohio companies that increase their penetration into the Ohio gasoline market. Corn growers in *every* state benefit from the rise in prices which accompanies the increased demand. For example, the average increase in farm income for each additional gallon of ethanol produced and marketed due to R.C. 5735.145(B) will be \$.58 per gallon over the 1986-94 period;[19] and the average savings to the federal government will be \$.88 per gallon over the same period.[20] If the analysis of *Pike v. Bruce Church,* 397 U.S. 137 (1970), is at all applicable to state created and maintained commerce which does not respond to natural economic forces, then it must take into account the benefits conferred by R.C. 5735.145(B) on all of commerce, for to do otherwise unduly deprives sovereign states of the right to enact economic legislation where Congress has not pre-empted the field.

Having defined the relevant commerce, *Pike* requires that the "burden" be weighed against the putative local benefit to determine if the burden is so excessive that it competes with the national interest furthered by the Commerce Clause. The national interest furthered by the negative or dormant commerce clause, that of preventing state lines from becoming "barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976), is furthered rather than infringed by R.C. 5735.145(B) or similar laws.

[18] There is also no reason to believe New Energy is driven out of the Ohio market. There are many non-fuel commercial uses for ethanol, and there are many ways in which a fuel ethanol producer or dealer can reduce purchasing and transportation costs. Nothing in the Commerce Clause insulates New Energy Co. from the economic necessity of initiative and resourcefulness, or guarantees to it the current operating structure that it has. This Court has said that it cannot "accept [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *Exxon v. Governor of Maryland,* 437 U.S. 117, 127 (1987).

[19] Agricultural Economic Report at p. 38.

[20] *Id.* at p. 34.

Fuel ethanol and surplus corn, by the economic laws of supply and demand, do not flow freely in commerce. Such trade exists and remains viable only through massive state and federal expenditures. Illinois and Ohio, among other states, have recognized that the state and national interests coincide and require the expenditure of funds to develop alternative markets for farm products in order to resolve the farm crisis.[21]

It is important "to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976). Such a distinction and concern shaped the decision in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Court upheld the raisin marketing program provisions of the California Agricultural Prorate Act against anti-trust and Commerce Clause challenges brought by a producer and packer of raisins. The program compelled delivery of over two-thirds of the raisin crop to a program committee, which controlled the marketing of the crop in order to enhance or maintain the price by means of restraints on competition between producers. The Court accepted at the outset that the program had a substantial effect on interstate commerce. The question then was whether, in the absence of congressional action prohibiting or regulating such transactions, the program violated the Commerce Clause.

[21] The National Advisory Panel concluded that "[o]ne perspective that must not be lost as the impact of ethanol on the agricultural sector is considered, is the long-term implications versus the near-term impacts. In an era of worldwide overproduction of grains, this excess production capacity is considered a burden to the trade and economic policies of many countries. Nontraditional industrial uses for grains should be viewed in the context of a tool to increase long-term demand. An increase in the long-term demand is the only permanent solution to the continuing high cost of supporting the farm sector." National Advisory Panel Report at p. xix.

The Court noted that when Congress has not exercised its powers under the Commerce Clause, and a state exercises its sovereign powers by legislation that has an effect on commerce, "the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." *Id.* at 362. The Court then concluded that the effect of the program on national commerce was "such as to not conflict but coincide with a policy which congress has established with respect to it." *Id.* at 363. The same conclusion is warranted here and the factors considered by the *Parker* Court in validating the California program, being present here, merit validation of Ohio's legislation.

The Court discussed the severely depressed state of the raisin industry, and detailed the extensive and expensive state and federal loan, subsidy and assistance programs designed to reduce the surplus of raisins and raise the market price of raisins. The opinion could just as easily have been describing the current farm crisis and the state and federal programs it made necessary. The Court stated that:

> The history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the market of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. . . . In comparing the relative weights of the conflicting local and national interests involved, it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. . . . Hence we cannot say that the effect

> of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production.

317 U.S. at 367-368.

The same findings can be made here, not only as to the corn industry but also about the ethanol industry. Ohio R.C. 5735.145(B) serves the interests of the federal government and the majority of state governments by promoting the common cause of making the air safer to breathe, reducing reliance on foreign oil, and decreasing the surplus of corn, thus raising the price of grain and reducing the subsidies that governments must pay. Not only is a subsidy not a "burden" such as the Commerce Clause was intended to prohibit, but its effect on interstate commerce does not infringe upon or compete with any national interest.

Absent state subsidies, such as those which Ohio, Illinois and other states have been willing to make, there would be no flow of ethanol in interstate commerce. Ohio R.C. 5735.145(B) increases the flow of ethanol and efficiently achieves the penetration of blended fuels into the gasoline market to improve the quality of the environment and increase the demand for surplus grain. It may be that at some time Congress will decide that a more uniform system of furthering these goals is necessary but, until such a decision is made, state legislation should not be invalidated on the ground that the state must subsidize the ethanol industry of all states rather than subsidize the industry of those states which provide the greatest opportunity for market penetration prior to the expiration of the federal excise tax exemption for fuel blends in 1992. Such legislation should not be invalidated when in fact it does subsidize the grain industry of all states, including Indiana.

CONCLUSION

The State of Illinois respectfully submits that the decision of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

SHAWN W. DENNEY
Solicitor General, State of Illinois

State of Illinois Center
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3312

Counsel for Amicus Curiae
The State of Illinois

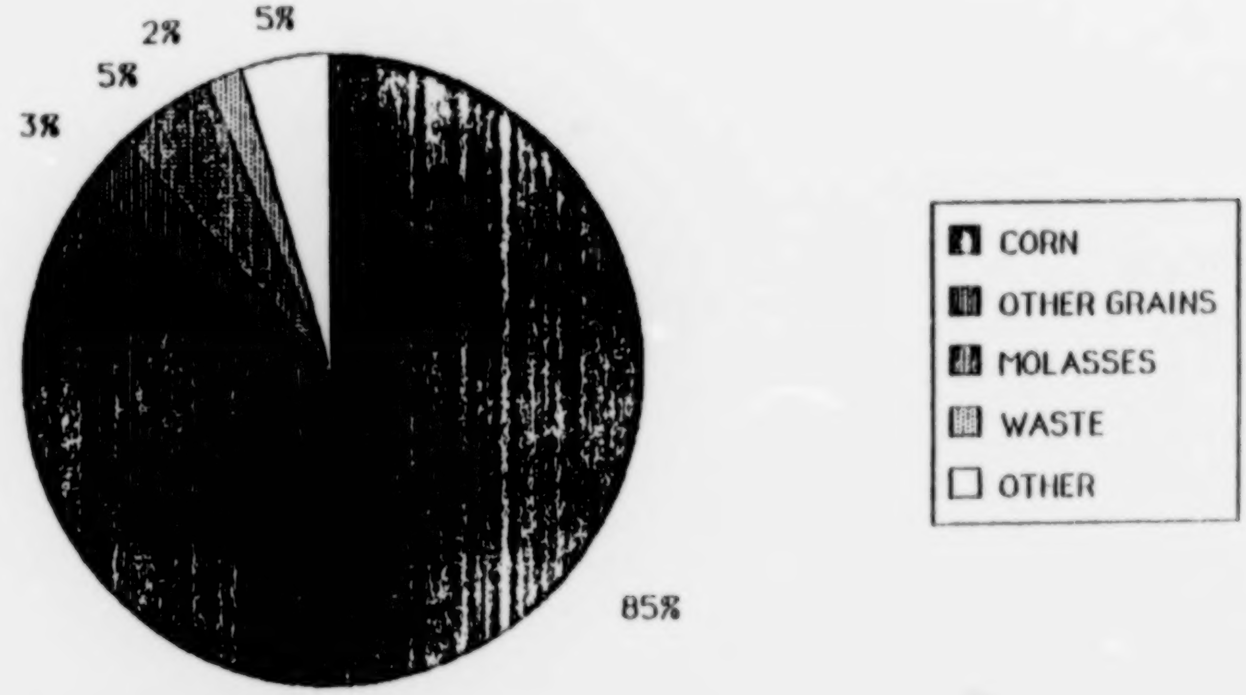
ROSALYN B. KAPLAN *
MICHAEL WYNNE
Assistant Attorneys General
State of Illinois Center
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 917-6141

Of Counsel

* Counsel of Record

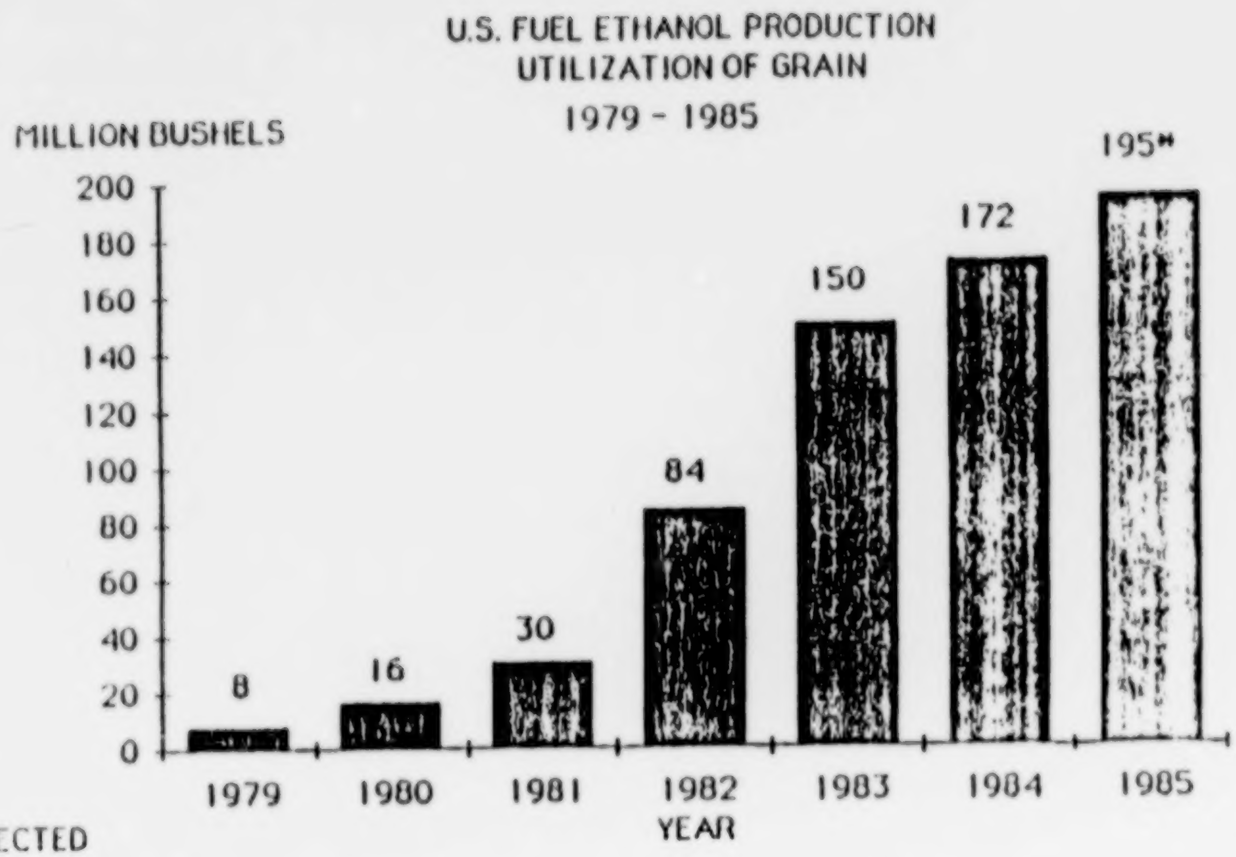
APPENDIX

FEEDSTOCK UTILIZATION AS A PERCENTAGE OF CURRENT ETHANOL PRODUCTION



SOURCE: INFORMATION RESOURCES INCORPORATED

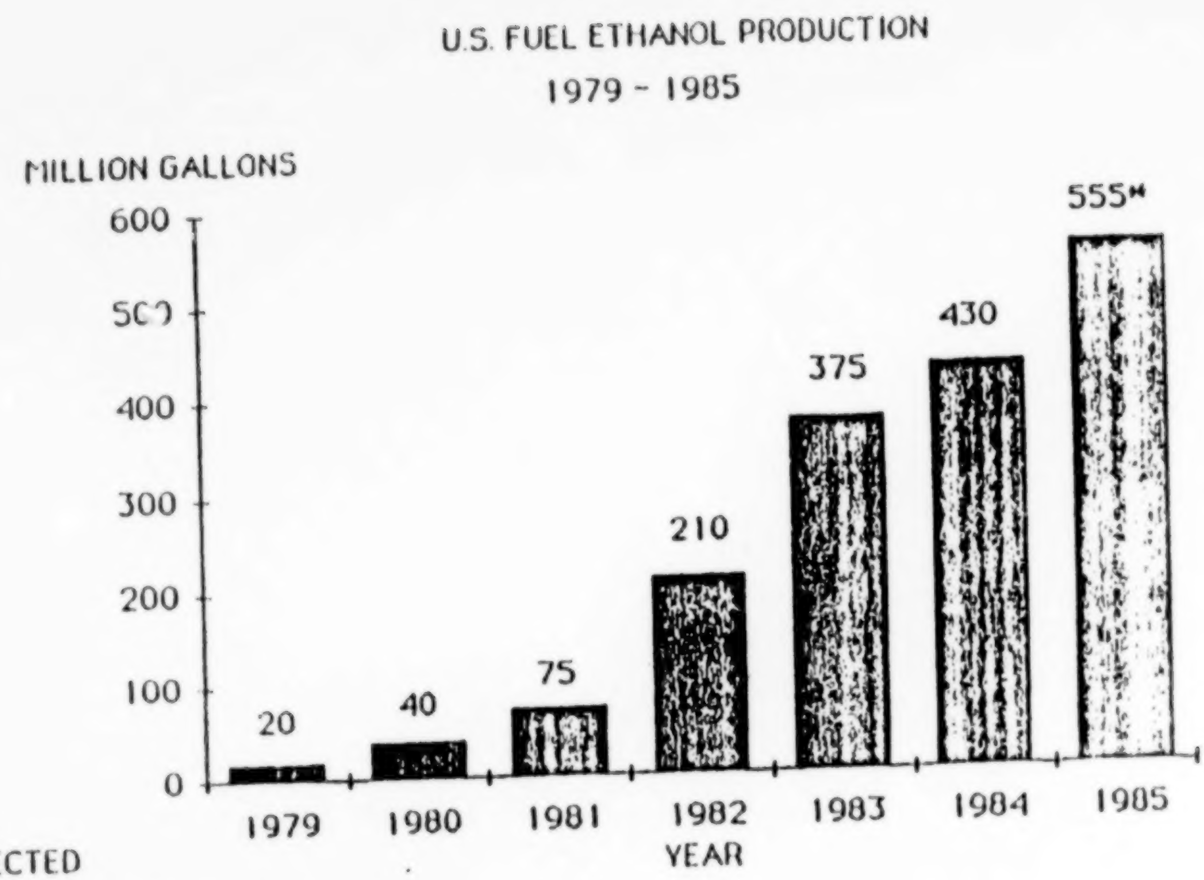
Exhibit A



*PROJECTED

SOURCE: INFORMATION RESOURCES INCORPORATED, WASH., D.C.

Exhibit B



* PROJECTED

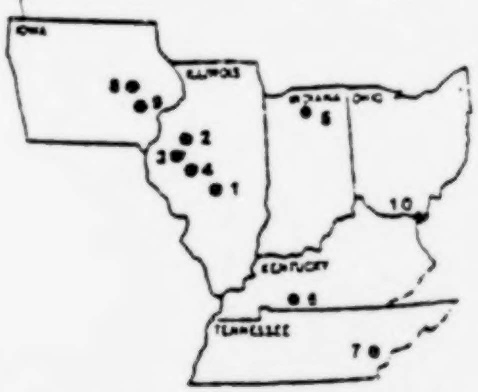
SOURCE: INFORMATION RESOURCES INCORPORATED, WASH. D.C.

Exhibit C

ETHANOL ANHYDROUS CAPACITY
OF MAJOR PLANTS
(Plants Larger Than 10 mm Gal./Year)

Company	Location City/State	Capacity to Supply IL (GPY)
	MAJOR ILLINOIS ETHANOL PRODUCERS	
1) ADM	Decatur, IL	150,000,000
2) ADM	Peoria, IL	90,000,000
3) Pekin Energy	Pekin, IL	70,000,000
4) Midwest Solvents Co.	Pekin, IL	11,000,000
TOTAL ILLINOIS		321,000,000
	OTHER MAJOR MIDWEST ETHANOL PRODUCERS	
5) New Energy	South Bend, IN	50,000,000
6) Kentucky AG	Franklin, KY	20,000,000
7) A.E. Staley	Loudon, TN	40,000,000
8) ADM	Cedar Rapids, IA	60,000,000
9) Grain Proc. Corp.	Muscatine, IA	10,000,000
10) South Point	South Point, OH	60,000,000
TOTAL REGIONAL		243,000,000
TOTAL ILLINOIS		321,000,000
TOTAL MIDWEST REGION (IL, IA, IN, OH, KY, TN)		564,000,000

MAJOR MIDWEST ETHANOL PRODUCERS



SOURCE: 1985 U.S. Alcohol Fuels Industry Data Base
Published by: Information Resources, Incorporated,
Washington, D.C.

Exhibit D